IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Criminal Appeal No.367 of 2003.

Judgment reserved on 28.2.2007.

Date of decision:18.04.2007.

Sot Ram ..Appellant.

Versus

State of H.P. ..Respondent

Coram

The Hon'ble Mr.Justice Surjit Singh, J.

The Hon'ble Mr. Justice Dev Darshan Sud, J.

Whether approved for reporting ?[1]

For the Appellant : Mr. M.S. Guleria, Advocate.

For the respondent : Mr. S.D. Vasudeva, Addl. A.G. with Mr. D.S. Nainta, Dy.AG.

Dev Darshan Sud, J.

This appeal has been preferred by the appellant against the judgment of conviction and sentence for an offence under Section 20 of the

[1] *Whether the reporters of Local Papers may be allowed to see the judgement*?

Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'The Act') passed against him by the Special Judge. Appellant has been sentenced to rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lac and in default of payment of fine to undergo rigorous imprisonment for a further period of four years.

The prosecution case, in brief, is that on 21.10.2002 around 3 p.m., the appellant was apprehended in Aut Bazar being in conscious possession of 2 Kgs of charas. On 21.10.2002, PW-10 H.C. Dhani Ram alongwith H.C. Hukam Chand and Constable Narender Kumar, was deployed on traffic checking duty. Around 3.30 p.m., one Tata Sumo vehicle bearing No.HP-01-8100 came from Banjar side and was signalled to stop. The driver stopped the vehicle. He was asked to show the papers of his vehicle. According to the prosecution, one person was sitting with the driver on the front seat while another person was sitting on the rear seat with a gunny bag lying by his side. On inquiry, he disclosed his name as Sot Ram. He stated that he had

taken lift in the vehicle and that the bag belonged to him. On checking, it was found that there was another bag inside the gunny bag which was stitched. On opening the stitches, charas weighing 2 kgs. wrapped in polythene packets was recovered.

PW-10 H.C. Dhani Ram took two samples of 25 grams each as per procedure. The samples and remaining charas were taken into possession in the presence of PW-1 Devinder Kumar, driver of the vehicle and PW-2 Rajmal, who was sitting beside the driver. The prosecution led evidence that the mandatory procedure under the Act was complied with. The petitioner was arrested and he was taken to Police Station, Aut. After completion of the investigation and on obtaining the report of the Chemical Examiner, the accused was charged for offence under Section 20 of the Act. His case under Section 313 of the Code of Criminal Procedure was one of total denial.

The learned trial Court, after considering the oral as well as documentary evidence on record, concluded that the appellant was guilty of the offence

as charged and he was therefore convicted and sentenced to 10 years rigorous imprisonment and ordered to pay fine of Rs.1akh, in default to undergo further rigorous imprisonment for four years. The learned trial Court has considered the evidence in four categories, namely, (i) direct evidence regarding recovery; (ii) evidence with regard to special report; (iii) corroborative evidence and (iv) report of the expert.

According to the learned trial Court, the evidence on record, oral and documentary, established the prosecution has been able to prove its case beyond reasonable doubt. While considering the direct evidence of recovery, the evidence of PW-1 Devinder Kumar, driver of the vehicle, PW-2 Raj Mal, PW-3 HC Hukam Chand, PW-4 Constable Narender Kumar and PW-10 HC Dhani Ram, was considered alongwith the documentary evidence, namely arrest memo Ex.PB, specimen seal Ex.PC, wrapper in which the samples were kept Ex.P-2 and Ex.P-3, the spot map Ex.PM. On the second point, the evidence of PW-7 HC Sarwan Kumar and PW-6 HC Ajit

Singh, was considered. On the corroborative aspect, the evidence of PW-5 Kushal Kumar, PW-8 Ravi Dutt, Shopkeeper at Aut and PW-9 S.I. Dabe Ram, SHO Aut, was considered. The report of the Chemical Examiner Exts. PK and PL, according to the learned trial Court, in conjunction with the other evidence, namely that of recovery and the ocular evidence established beyond reasonable doubt that the appellant was in conscious possession of Charas and, therefore, guilty of offences under Section 20 of the Act.

Learned counsel appearing for the appellant has assailed the judgment on number of grounds. Learned counsel submits that there is no evidence on record to link the contraband with the appellant. He submits that not only the recovery but the factum of the purported contraband being charas has not been established. According to the learned counsel, there are discrepancies in the evidence, both oral and documentary, which go to the root of the matter and does not establish the guilt of the accused. He has submitted that even if the evidence of the prosecution

is accepted as it is, no criminality can be attributed to the accused.

On the point of recovery, learned counsel submits that PW-1 Devinder Kumar and P W-2 Raj Mal who were travelling in the Tata Sumo have been cited by the prosecution as being independent witnesses. Both these witnesses have turned hostile and they have not supported the case of the prosecution. Learned counsel submits that merely because they have turned hostile, would not be a ground for discarding their entire testimony. He places reliance on the decision in Bhola Ram Kushwaha versus State of Madhya Pradesh (AIR 2001 SC 229).

Before considering the principles applicable, the evidence of both the witnesses may be considered. They have categorically stated that the appellant did not travel in the vehicle which was stopped by the police for checking. In their cross examination, nothing material has been elicited to show that the evidence cannot be relied upon. Learned counsel also submits that the evidence of PW-3 HHC

Hukam Chand, when read as a whole casts a serious doubt on the recovery. This witness, according to the learned counsel, has stated in his examination in chief that on being asked by PW-10 HC Dhani Ram, the appellant stated that the bag belonged to him. However, in cross examination, he states that this witness had asked the driver and the other person who were travelling in the vehicle as to to whom this bag belonged. To the similar effect was the statement of PW-4 Constable Narender Kumar who, in his cross examination, had submitted that PW-10 HC Dhani Ram had asked the driver about the ownership of the bag after he had already asked the accused. The submission of the learned counsel is that once the appellant had admitted that the bag belonged to him, there was no necessity for asking the driver and the other passengers travelling in the vehicle as to the identity of the person who was in possession of the bag. He submits that both these witnesses could not be treated as being independent witnesses as they were travelling in the same vehicle and the reason as to

why they have been cited as witnesses is not clear. He further states that it is in evidence that the vehicle was being checked in the bazaar and obviously there were a number of persons present there. Why no independent witness was associated, the prosecution has not come forward with any explanation. As an adjunct to this submission, learned counsel submits that the provisions of Section 100(4) Cr.P.C. have not been complied with. In his statement, PW-3 HHC Hukam Chand states that the person who was sitting by the seat of the driver, disclosed his name as Sot Ram (i.e. the appellant) and on asking by HC Dhani Ram PW-10, he claimed the gunny bag to be his own. This in effect is also the statement of PW-4 Constable Narender Kumar as noticed above.

The evidence of recovery does create a doubt regarding conscious possession by the appellant. It is true that merely because PW-1 and PW-2 have turned hostile may not be a ground for acquittal as observed by the Hon'ble Supreme Court in Bhola Ram Kushwaha's case (supra). However, when coupled with

the evidence of the other witnesses, namely PW-10, PW-3 and PW-4, it creates a serious doubt in the mind of the Court regarding the recovery and conscious possession of the contraband. We may notice that the recovery has been made from a vehicle in which according to the prosecution, not only the appellant, but PWs 1 and 2 were also travelling. How and under what circumstances they have been cited as independent witnesses is not clear. Nonetheless, they being witnesses for the prosecution, their evidence when read with those of the three witnesses of the recovery as noticed by us, leaves no doubt in our mind that the true story has not been put forth by the prosecution. Why independent witnesses were not associated is another factor which needs to be considered. PW-1 Devinder Kumar has stated that he was passenger from Kullu to Banjar. He was returning from Banjar, the police stopped him at Aut and at that time one mechanic was travelling with him in the taxi and there was no other person. According to him, at about 1.30 P.M. when he was standing at the bus stand looking for

passengers to be carried in his taxi PW-1 Devinder Kumar was taken to the police station. In these circumstances, it becomes difficult to believe that no independent witnesses other than PW-1 and PW2 were available. Surely, both PW-1 and PW-2 were not looking for passengers in an isolated place, but in or near the bus stand where there are a number of persons.

Learned counsel has placed reliance on the decision in Kaur Sain versus State of Pubjab (AIR 1974 SC 329), wherein the Hon'ble Supreme Court has held that where the Panchas of seizure memo were involved in some criminal cases etc. and lived near the Police Station and were also intrested in the election of the candidate of the political party other than that to which the accused belonged, their evidence should be considered with circumspection. He has also drawn our attention to the decision in Kingett Edward Christopher versus State of H.P.,(1996) (2) Crimes 245), wherein it was held that in the event of the non association of independent witnesses, the

evidence of recovery becomes doubtful. Admittedly, the sole factor of non association of the witnesses shall not entitle the petitioner to acquittal. However, in the totality of circumstances and when read with the evidence produced by the prosecution, the recovery of the contraband itself becomes doubtful. As noticed by us above, the recovery has been made from a vehicle in which the accused was not the sole occupant. The reason for not associating independent witnesses or for associating the driver and the other occupant is not clear. According to learned counsel, mandatory and solitary provisions of Section 100(4) Cr.P.C. have not been complied with. There can be no dispute to this proposition of law. Learned counsel also submitted that when the evidence is considered sequentially, it has come in the deposition of the prosecution witnesses, more especially in the PW-3, that the police party remained standing outside the vehicle. In these circumstances, it was not possible to state as to where the bag was lying. Whether it was lying in front of the seat,

under the seat or near the driver seat. In the totality of the circumstances, we feel that the entire evidence brought by the prosecution regarding the recovery is neither satisfactory nor sufficient to fasten criminal liability on the appellant. Our attention has been invited to the decision of this Court in Bruce Claridge versus State of H.P., (2004 (2) Shim.L.C. 99), which follows the judgment of the Hon'ble Supreme Court in *Madan Lal and another versus State of H.P. and another (2003 (7) SCC 465).* According to the said decision, it is the conscious possession which is to be established. Mere presence in the vehicle will not attract any criminal liability. Coupled with the fact that PW-1 and PW-2 were made witnesses, the entire recovery becomes very doubtful.

Learned counsel submits that the seizure of the contraband is rendered doubtful, as the NCB certificate Ex.PK does not show the date of drawal of the sample. Column 5 which is in following terms "Date of drawal and dispatch of sample---" is

blank. The certificate Ex.PL by the Chemical Examiner only states the date of receipt of the sample in the laboratory.

Learned counsel for the State has drawn our attention to judgment of this Court in Chet Ram and others versus State of H.P. and others (2004 (2) Shim. L.C.423) and referred to the principles of law laid down that it is well settled that failure to cross examine witnesses on particular aspect lead to a presumption that such aspect is not disputed. Learned counsel relies upon the judgment of the Hon'ble Supreme Court in Madan Lal and another versus State of H.P. (supra). According to the learned counsel, the law laid down by the Apex Court clearly establishes that the presence of the appellant in the vehicle itself was sufficient to have established the conscious possession. He relies upon paras 22 to 25 of the judgment which run as under:

> **"22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different**

backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja (1979) 4 SCC 274)* to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in *Gunwantlal v. State of M.P.* (1972) 2 SCC 194) possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

25. The word "possession" means the legal right to possession (see *Heath v. Drown* (1972) 2 All ER 561). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness* (1972) 2 All ER 561)."

There is no dispute to this proposition. However, this case was followed and applied by this Court in Bruce Claridge 's case (supra). Their Lordships have held that conscious possession would be dependent upon the facts and circumstances of each case. If the ratio is to be applied as submitted by the learned counsel for the respondent, there is no explanation as to why PWs 1 and 2 had not been treated as suspects. In the totality of the circumstances, we hold that the evidence on record is insufficient to establish the guilt of the accused.

We have no doubt in our mind that the totality of the circumstances does not establish the case of the prosecution beyond reasonable doubt. We hold that the conscious possession has not been established. We further hold that the evidence of the prosecution has been contradicted on material particulars by their own witnesses and that the non association of the independent witnesses also renders the case of the prosecution doubtful. As such, we

accept the appeal, set aside the judgment of the trial Court and acquit the appellant. He shall be released and set at liberty forthwith, in case his detention is not required in some other case(s).

(Dev Darshan Sud), J. **(Surjit Singh), J.**

April 18, 2007(ss/PC).

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Criminal Appeal No.367 of 2003.

Sot Ram ……**.Appellant**

Versus

State of H.P. …..**Respondent.**

Judgment for consideration, please.

(Dev Darshan Sud), J.

I agree / do not agree.

(Surjit Singh), J.

List for judgment on .

(Dev Darshan Sud), J.

Court Secretary.